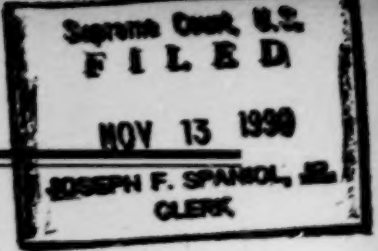


90-879
No. 2



IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

RALPH RODNEY FIELDS,

Petitioner,

v.

JOSEPH T. DURHAM, ET AL.,

Respondents.

APPENDIX

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

BARRY L. STEELMAN,
Counsel of Record,

NICHOLAS D. COWIE,
BARRY L. STEELMAN, P.A.,

Suite 720,
Two Hopkins Plaza,
Baltimore, Maryland 21201,
(301) 539-8603,

Attorneys for Petitioner.

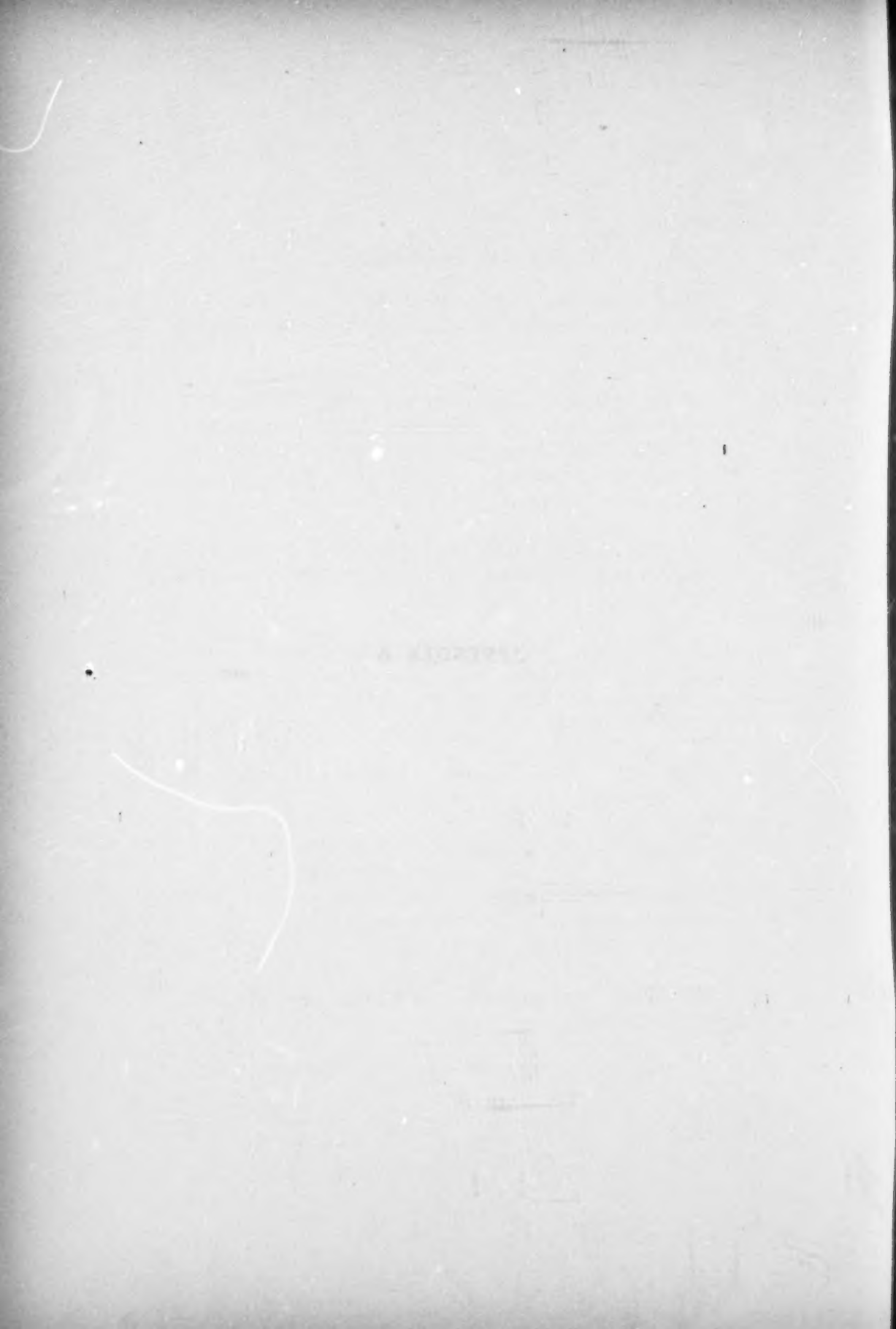


Index to Appendix

- A. Memorandum Opinion Of The United States District Court dated January 29, 1988.
- B. Pertinent Portions Of The Official Transcript Of Hearing Before State Court For Summary Judgment And Oral Ruling dated January 2, 1990. (Pages included at 24-end)
- C. Order Of State Court Granting Partial Summary Judgment dated January 2, 1990.
- D. Order Of State Court Denying Post Trial Motions And Entering Judgment inPlaintiff's Favor dated March 1, 1990.
- E. Motion To Stay Federal Appeal Process.
- F. Order Denying Motion To Stay.
- G. Petition For Rehearing And Suggestion For Rehearing In Banc, dated August 1, 1990.
- H. Order Denying Petition For Rehearing.

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- A. Memorandum Opinion of the United States District Court dated January 29, 1954.
- B. Testimony of the Official Transcript of Hearing before the Court for Summary Judgment and Oral Hearing dated January 2, 1955. (Pages included 40-42-43)
- C. Order of the United States District Court for Summary Judgment dated January 2, 1955.
- D. Order of the United States District Court for Summary Judgment dated January 2, 1955.
- E. Motion to Stay Federal Appeal Process.
- F. Order denying Motion to Stay.
- G. Petition for Habeas Corpus and Writ of Habeas Corpus for Remanding to State Prison August 1, 1955.
- H. Petition for Habeas Corpus and Writ of Habeas Corpus.



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RALPH RODNEY FIELDS *

v. * Civil no. JFM-
862941

JOSEPH T. DURHAM *
et al

* * * * *

MEMORANDUM

In this action against the President and the Board of Trustees of the Community College of Baltimore, plaintiff challenges the termination of his employment as Dean of Faculty/Provost of the College. Plaintiff asserts a claim under 42 U.S.C. Section 1983 (1982), alleging that Defendants violated his due process rights by not giving him a full and fair hearing. He also asserts pendent state claims for breach of contract, civil conspiracy, tortious interference with contractual relationships and wrongful discharge.

Defendants moved for summary judgment as

to all of plaintiff's claims, and the parties submitted extensive memoranda on the issues raised by defendants. After reviewing the summary judgment papers, this Court wrote to counsel asking them to address the question of why the availability to plaintiff of post deprivation remedies under state law does not constitute a bar to plaintiff's 1983 claim. The parties have now submitted memoranda on that issue.

The gravamen of all of the claims asserted by plaintiff in this action, both state and federal, is that before terminating his employment, defendants did not affirm to him procedural rights to which he was entitled under his contract and under the College's rules and regulation. According to plaintiff,

these rights are at least as broad as the rights to which he was due under the due process clause. Accordingly, it is clear that the allegedly wrongful acts of which plaintiff complains were not sanctioned by any established [state] procedure. To the contrary, plaintiff is contending that defendants acted arbitrarily by disregarding the established procedure which they were required to follow under state law. Under these circumstances it is clear that plaintiff has stated no claim under Section 1983. See Hudson v. Palmer, 468 U.S. 517 (1984); Parratt v. Taylor, 451 U.S. 527 (1981); Yates v. Jamison, 782 F.2d 1182 (4th Cir. 1986); cf. Logan v. Zimmerman Brush Co., 455 U.S.422 (1982).¹ The very fact that

¹ Plaintiff refers to Judge Ervin's "strong dissent" in Yates. However, Judge Ervin did not dispute the soundness

plaintiff has asserted pendente state claims in this action attest to the availability to him of adequate post deprivation remedies under state law.

For these reasons, defendants' motion for summary judgment will be granted as to plaintiff's Section 1983 claim. The Court will decline to exercise pendent jurisdiction over plaintiff's state law claims. He is free to pursue those claims in state court.

Date: January 29, 1988 /S/

J. Frederick Motz
United States
District Judge

of the principles upon which this case turns. Rather, he was of the view that defendants' conduct in Yates was undertaken pursuant to city policy and, thus, was not authorized as required by Parratt and Hudson.

IN THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
MARYLAND

PAUL R. JOHNSON, JR.

Plaintiff,

Case No. 100-100000
0000000000

vs.

JOHN F. BROWN, JR.

Defendant.

Filed May 2, 1950

RECEIVED BY THE CLERK OF THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
MAY 2 1950

APPROVE THE COURT

APPENDIX B

EXHIBITS ON BEHALF OF THE PLAINTIFF

HARRY L. JOHNSON, JR.
1000 14th St. N.W.
Washington, D.C.

EXHIBITS ON BEHALF OF THE DEFENDANT:

JOHN F. BROWN, JR.
1000 14th St. N.W.
Washington, D.C.

RECEIVED BY THE CLERK OF THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
MAY 2 1950
MICHAEL J. BROWN, JR.
1000 14th St. N.W.
Washington, D.C.

IN THE CIRCUIT COURT FOR BALTIMORE CITY,
MARYLAND

RALPH RODNEY FIELDS,

Plaintiffs,

Case No. 89116-
064/CL96499

Versus

JOSEPH T. DURHAM, et al

Defendant.

_____/ January 2, 1990

REPORTER'S OFFICIAL TRANSCRIPT OF
PROCEEDINGS (NOV. HEARING)

BEFORE THE HONORABLE HILARY CAPLAN, JUDGE

APPEARANCES ON BEHALF OF THE PLAINTIFF:

BARRY L. STEELMAN, ESQUIRE
DANIEL S. KATZ, ESQUIRE

ON BEHALF OF THE DEFENDANT:

LAURICE D. ROYAL, ESQUIRE
BURTON H. LEVIN, ESQUIRE

REPORTED BY:

LINDA LINDSEY

Official Court Reporter

Mitchell Courthouse, Room 507

Baltimore, Maryland 21202

.... I think the bylaws didn't comply with the bylaws. We are not saying tenure as administrator. He held tenure as faculty member.

Your Honor, we ask that you grant partial summary judgment stating he did, in fact, have tenure. He violated tenure. They can't -- constitutional -- August 1986 to present order and a hearing on damages.

THE COURT: Anything else Ms. Royal?

MS. ROYAL: No, Your Honor.

THE COURT: Very well. Although the partial summary judgment denied by Judge Hubbard at a prior hearing, the Court had ample opportunity to review all the additional material that was submitted, Motion for Reconsideration requested by the Plaintiff in this case. The Court had an opportunity to read all the affidavits at length over the course of the

holidays, as well as to read the memorandum of both the Plaintiffs and Defendants. The Court believes that the Court should grant a Motion for Reconsideration. I shall grant that, and have a right to do that under the case law of the State.

The next issue, partial summary judgment itself, the issue presented, so there tenure for this gentlemen and does the letter of June 3rd, 1970 grant tenure does the memorandum of bylaws of 12-15-80 take that away. The court finds there is tenure in this case and that under the June 3rd, 1970 letter, tenure was granted in two particular areas. One as a faculty member, in my mind meaning either part of teaching unit or teaching or planning type of position, which teachers involve themselves in and also administrator for if indeed the school at

that particular time had made a mistake I think they are stuck with that mistake.

At a later date, 12-15-80, they seem by agreement changing their thinking, attempted by argument saying there is know ambiguity in the 12-15-80 bylaws but the Court thinks otherwise. It can be read a number of ways. In any event, you cannot remove from Mr. Fields what he already has, that is tenure as a faculty member. If there was a mistake made back in 1970 and the requirements were very minimal tenure was granted on three years residency of Plaintiff, it was granted. The Court believes that he keeps that and no action I see before me under this motion for partial summary judgment will take that away. So, the Court finds that is will grant a motion for summary judgment, number one finding there is indeed tenure as a faculty member. Number

two, violated the contractual and constitutional rights under the bylaws since he was not granted the appropriate rights under the original bylaws which govern this particular case.

I will sign the appropriate order. I think it is before me and we will proceed in this case on the issue of damages next Monday. I have so signed it.

MR. STEELMAN: I believe it is Tuesday.

THE COURT: Yes, it seems like Monday. Today is Tuesday, January 2.

(Proceedings were concluded.)

c:\Fields.App



RALPH RODNEY FIELDS	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
JOSEPH T. DURHAM,	*	BALTIMORE CITY
et al		
Defendant	*	Case no. 89116
		064 CL96499
	*	*

ORDER

Upon consideration of the Motion For Reconsideration and Partial Summary Judgment filed by Plaintiff, it is this 2nd day of January, 1990,

ORDERED, that said Motion shall be, and hereby is, GRANTED, and it is further

ORDERED, that partial summary judgment shall be entered in favor of Plaintiff on the issues of violation of his due process rights and breach of his contractual rights in connection with his status as a tenured faculty member.

/S/ _____
Hilary D. Caplan, Judge

STATE OF NEW YORK

IN SENATE

JANUARY 1, 1907

REPORT OF THE

COMMISSIONER OF

THE STATE OF NEW YORK

FOR THE YEAR 1906

ALBANY:

1907

PRINTED BY THE

STATE OF NEW YORK

FOR THE YEAR 1906

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PRINTED BY THE

STATE OF NEW YORK

FOR THE YEAR 1906

APPENDIX D



RALPH RODNEY FIELDS	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
JOSEPH T. DURHAM	*	BALTIMORE CITY
et al	*	
Defendant	*	Case no. 89116
	*	064 CL 96499
	*	*

ORDER

The Defendants' Motion For Judgment N.O.V. or, in the alternative, for a New Trial, and the Plaintiff's opposition thereto having been filed, the matter came before this Court for oral argument on Friday, February 23, 1990. Having considered the parties' briefs and all oral arguments in support thereof, including, pursuant to Rule 2-533(b), the arguments asserted by the Defendants in their Memorandum of Law in Support of the Motion for New Trial, the Court at the hearing denied Defendants' Motions for Judgment N.O.V. and New Trial.

THEREFORE, it is this 1st day of March, 1990 ORDERED and the same hereby be that all Motions of the Defendants for Judgment N.O.V. and/Motions for a New Trial are and the same are hereby DENIED.

FURTHER, it is ORDERED this 1st day of March, 1990, that the verdict of the jury as to the due process count, is and the same hereby is REMITTED by the amount of \$85,642.00, thereby leaving the verdict and judgment entered on this date as follows:

- (1) As to All Defendants:
 - Contract Court \$100,000
 - Due Process Count, Compensatory Damages \$400,000
- (2) Punitive Damages as to Defendant Durham \$500,000
- (3) Punitive Damages as to Board of Trustees \$750,000

/S/

Hillary D. Caplan,
Judge

True Copy Test

/S/

Saundra E. Banks, Clerk

APPENDIX E



UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No.: 88-1564

RALPH RODNEY FIELDS

Plaintiff/Appellant

v.

**JOSEPH T. DURHAM, Individually and as
President of
Community College of Baltimore; COMMUNITY
COLLEGE OF
BALTIMORE; MAYOR AND CITY COUNCIL OF
BALTIMORE CITY;
JAMES S. JEFFERS, Chairman of the Board
of Trustees
Community College of Baltimore; THE BOARD
OF TRUSTEES
COMMUNITY COLLEGE OF BALTIMORE**

Defendants/Appellees

MOTION TO STAY FEDERAL APPEAL PROCESS
DURING THE PENDENCY OF STATE COURT APPEAL

Appellant, Ralph Rodney Fields, by his
attorneys, Barry L. Steelman, Nicholas
D. Cowie and Barry L. Steelman, P.A.,
respectfully moves, pursuant to Rule 27

of the Rules of the United States Court Of Appeals for the Fourth Circuit, for this Honorable Court to stay the Appeal process during the pendency of the State Court proceedings and in support thereof, stated as follows:

1. Fields initially filed his Complaint and Prayer for Jury Trial in the United States District Court for the District of Maryland on September 23, 1986. On January 29, 1988, Judge J. Frederick Motz, of the District Court, issued a Memorandum and Order stating that "under these circumstances it is clear that Plaintiff has stated no claim under Section 1983." The Court was relying upon Parratt v. Taylor, 451 U.S. 527 (1981). The Court went on to say further that: "the very fact that Plaintiff has asserted pendent claims in this action attest to the availability to

him of adequate post deprivation remedies under state law.

2. Shortly thereafter, Fields filed an appeal in the United States Court of Appeals for the Fourth Circuit asserting that Parratt was not applicable and that the District Court erred in dismissing his 1983 claim. After briefing and oral argument, this Court affirmed the lower court's decision. Thereafter, Fields filed in the Supreme Court Of the United States, a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. Following briefing by all parties, the Supreme Court issued an Order on March 5, 1990 stating that: "The Petition for a Writ of Certiorari is granted. The Judgment is vacated and the case is remanded to the United States Court of Appeals for the Fourth Circuit for

further consideration in light of Zinerman v. Burch 494 U.S. ____ (1990)".

3. During the pendency of the appeals in the Federal Courts, Fields, so as not to be barred by limitations in the state Court, should his federal appeal be unsuccessful, filed suit in the Circuit Court for Baltimore City in 1989. Ralph Rodney Fields v. Joseph T. Durham, et al, in the Circuit Court for Baltimore City, Case No. 89116 064 CL96499. In the state court action, Fields sought both compensatory and punitive damages for deprivation of his constitutional property interests under the Maryland constitution, and for his state court actions including contract violations. Following additional discovery, the case proceeded to trial before a Jury in the State Court on January 9, 1990. Prior to trial, the Honorable Hillary D. Caplan,

granted summary judgment in Fields favor on both the due process and contract claims as to tenure only. The case proceeded to trial on both compensatory and punitive damages for the breaches of contract and constitutional due process.

4. At the conclusion of the trial, the Jury awarded Fields substantial compensatory damages for the Appellees' contractual and due process violations in depriving him of his tenure, and substantial punitive damages for the deprivation of his constitutionally protected property interests, without due process. Appellees' Motion For Judgment Not Withstanding The Verdict Or in The Alternative, For A New Trial, was denied. See Order of the Circuit Court for Baltimore City dated March 1, 1990 attached hereto as Exhibit 1.

5. Appellees have filed a Notice Of Appeal to the Maryland Court of Special Appeals appealing the lower court's rulings and the jury's verdicts.

6. Fields requests that this Court stay the federal appeal during the pendency of the state court appeal process in that he will not seek a new trial on the merits in the federal court if his state court verdicts are upheld at the conclusion of the State appeal process.

7. Fields contends that such a stay would presently benefit the Court's docket, judicial economy, and the parties time and expenses by avoiding matters which may become duplicative or moot. However, should he not be successful on the state court appeal, and/or the state appellant court holds that Dr. Fields proper recourse was a 42 U.S.C. Section

1983 action and not a state action, then Fields would continue to pursue the action that he initially filed in the United States District Court.

8. Furthermore, Fields contends that under res judicata and/or collateral estoppel, he would be entitled to seek recourse in the United States District Court under 42 U.S.C. Section 1988 at the conclusion of a successful appeal in the state court system.

WHEREFORE, Appellant respectfully requests that this Court stay the herein appeal pending the outcome of the state process. However, should the Court in its discretion decide not to stay this appeal, Appellant Fields has this date filed the Supplemental Brief as requested by this Honorable court on March 26, 1990.

BARRY L. STEELMAN, P.A.

BARRY L. STEELMAN

NICHOLAS D. COWIE
Suite 720
Two Hopkins Plaza
Baltimore, Maryland 21201
(301) 539-8603

I HEREBY CERTIFY that on this 13th day of April, 1990, that a copy of the foregoing Motion to Stay Federal Appeal Process During The Pendency Of State Court Appeal was mailed, postage prepaid, to John S. Wood, Esquire, Bruton Levine, Esquire, Room 135, City Hall, 100 North Holliday Street, Baltimore, Maryland 21202.

BARRY L. STEELMAN

RALPH RODNEY FIELDS	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
JOSEPH T. DURHAM	*	BALTIMORE CITY
et al	*	Case no. 89116
Defendant	*	064 CL 96499
	*	*

ORDER

The Defendants' Motion For Judgment N.O.V. or, in the alternative, for a New Trial, and the Plaintiff's opposition thereto having been filed, the matter came before this Court for oral argument on Friday, February 23, 1990. Having considered the parties' briefs and all oral arguments in support thereof, including, pursuant to Rule 2-533(b), the arguments asserted by the Defendants in their Memorandum of Law in Support of the Motion for New Trial, the Court at the hearing denied Defendants' Motions for Judgment N.O.V. and New Trial.

THEREFORE, it is this 1st day of March, 1990 ORDERED and the same hereby be that all Motions of the Defendants for Judgment N.O.V. and/Motions for a New Trial are and the same are hereby DENIED.

FURTHER, it is ORDERED this 1st day of March, 1990, that the verdict of the jury as to the due process count, is and the same hereby is REMITTED by the amount of \$85,642.00, thereby leaving the verdict and judgment entered on this date as follows:

- (1) As to All Defendants:
 - Contract Court \$100,000
 - Due Process Count, Compensatory Damages \$400,000
- (2) Punitive Damages as to Defendant Durham \$500,000
- (3) Punitive Damages as to Board of Trustees \$750,000

/S/

Hillary D. Caplan,
Judge

True Copy Test

/S/

Sandra E. Banks, Clerk

APPENDIX F



UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RALPH RODNEY FIELDS *

v. * Case No. 88-1564

JOSEPH T. DURHAM *
et al

* * * * *

ORDER

Upon consideration of Appellant's Motion To Stay Federal Appeal Process During Pendency Of State Court Appeal and Appellees Oopposition To The Motion To Stay, it is Ordered that the Motion To Stay is Denied and the parties shall proceed on the supplemental briefing schedule previously established. Appellees shall serve and file their brief on or before April 30, 1990, Appellant's Supplemental Reply Brief, if any, shall be served and filed seven days thereafter.

Entered at the direction of Judge
Wilkinson with the concurrence of Judge
Chapman and Judge Wilkins. For the
court.

/S/
signed by clerk

APPENDIX G

Entered at the American of Justice
with the registration of Justice
Carter and Judge Wilson. For the
year

at the office of
the clerk of the court

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

NO. 88-1564

RALPH RODNEY FIELDS,
Appellant

v.

JOSEPH T. DURHAM, et al
Appellees

**Appeal From The United States District
Court**

**For The District Of Maryland
(On Remand From The United States Supreme
Court)**

APPELLANT'S PETITION FOR REHEARING

AND

SUGGESTION FOR REHEARING IN BANC

**Barry L. Steelman,
Nicholas D. Cowie,
Barry L. Steelman, P.A.,
Two Hopkins Plaza - Suite 720
Mercantile Bank & Trust Bldg.
Baltimore, Maryland 21201
(301) 539-8603**

Attorneys for Appellant.

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- I. INTRODUCTION**
- II. STATEMENT OF PURPOSE**
- III. ARGUMENT**
- IV. IN BANC REVIEW**
- V. CONCLUSION**

I.

INTRODUCTION

On July 19, 1990, this Court, on remand from the United States Supreme Court, affirmed the District Court's dismissal of Appellant's, Ralph Rodney Fields ("Fields"), §1983 claim based on entirely new factual findings which were never considered below and which contradict the factual allegations of the Complaint as well as the undisputed Affidavits, discovery pleadings and documentary evidence which were before the District Court. Furthermore, these factual findings were contrary to the evidence established at the subsequent trial in the state court, which the Opinion completely overlooks and ignores. Finally, by making determinations on factual issues, the Court failed to properly apply the applicable standard of

review. In the judgment of counsel for Fields, material factual and legal matters were overlooked in this decision.¹

Originally, the Court affirmed the District Court's decision on ground that, under the Parratt and Hudson line of cases, the availability of post-deprivation remedies in State Court was sufficient to satisfy the requirements of due process, because, in his Complaint, Fields alleged only that he was terminated from the Appellee College as a result of unauthorized and unpreventable violations of State procedures by the Appellee College President and Appellee Board of Trustees. Fields v. Durham, 856

1

Pursuant to IOP 40.4, these factual and legal matters are succinctly listed in the "Statement Of Purpose". infra, at 2.

F.2d 655, 657 (4th Cir. 1988). Fields sought a Writ Of Certiorari, arguing that the 4th Circuit's application of Parratt and Hudson conflicted with the decision of a majority of the other Circuits. The Supreme Court granted certiorari and the case was subsequently remanded to this Court to reconsider its application of the Parratt and Hudson line of cases in light of Zinnermon v. Burch, 100 S.Ct. 975 (1990). On remand, however, this Court surprisingly did not reconsider its application of Parratt and Hudson. Instead, it affirmed the District Court on alternative grounds by making an improper factual determination that the pre-deprivation procedures afforded Fields in this case satisfied due process and, therefore, he failed to state a claim under §1983.

II

STATEMENT OF PURPOSE

In the undersigned counsels' judgment, this rehearing is warranted in that the Court, in its July 19, 1990 Order overlooked certain material factual matters in the record and also overlooked legal standards in reaching its decision which seriously undermines effectuation of the purposes and policies of 42 U.S.C. §1983 in this Circuit.

POINTS TO BE RAISED IN APPELLANT'S PETITION:

1. The Court overlooked the material facts concerning Fields' status as a tenured professor at the time of his termination. These factual matters include the undisputed and uncontroverted affidavits of college officials, the deposition testimony and Answers To

Interrogatories of Appellees; as well as material facts developed in a subsequent jury trial of Fields' claims in the state court, (Fields v. Durham, Circuit Court for Baltimore City, Case No. 89116-064/CL96499), which completely controvert many facts set forth in this Court's July 19, 1990 Opinion;

2. That this case, like the Street v. Surdyka, 492 F.2d 368, 374 (4th Cir. 1974) is "an extraordinary" case because following the initial appeal, the case was tried in the State court and material facts were developed and established. One such fact developed at the subsequent trial was that it became questionable whether the Board Of Trustees ever held an actual vote to terminate Fields from the College following the purported Board hearing. Therefore, the conclusion

reached in the July 19, 1990 Opinion on page 3, that "after the hearing on August 12, 1986, the Board unanimously affirmed Fields' discharge" overlooks a material fact below and is inaccurate;

3. The Court overlooked or incorrectly applied facts different from those established in the record below concerning the circumstances surrounding the notice and process given concerning Fields' termination. The Court overlooked the facts that the deficiencies given for the termination were not "serious" but rather, superficial and not actual performance deficiencies. Appendix at 25-26. These facts were alleged as such in the Amended Complaint (Id.) and were developed as superficial and not performance deficiencies at the subsequent trial in

the State court, but were overlooked by the Court in its recent opinion. Further, the Court overlooked the factual allegations below that Fields did not waive his appeal to the President's Cabinet as stated in the July 19, 1990 Opinion but rather was misled into agreeing to the waiver. Appendix at 28-31. Once Fields learned of the true circumstances, he demanded an appeal to the President's Cabinet but it was denied him. Id.; See Appellant's Supp. Reply Brief at 10. These facts were not only alleged in the Amended Complaint, but clearly established at the subsequent trial in the State court. Additionally, the opinion overlooks the fact that the Board never gave Fields an "impartial" hearing in that the Board never reviewed or considered Fields' written and

documentary evidence. Appendix at 32. Moreover, the Appellee president, who acted as both prosecutor and sole witness, communicated his case to the Board prior to the Board hearing but sat with the Board during their deliberations. Appendix at 32. Appellant's Supplemental Appendix at 26-27. Finally, prior to the hearing a replacement had already been chosen to replace Fields. Appendix at 33. These facts were uncontroverted in the record below but were overlooked as such by the Court; and

4. That the Court applied an incorrect standard of review in making factual findings that Fields was provided with procedures sufficient to satisfy the requirements of due process under the 14th Amendment. During the course of

this appeal there has been a dispute as to whether the proper standard of review is from an Order granting a Motion To Dismiss under Rule 12(b)(6) or from an Order granting a Motion For Summary Judgment under Rule 56. In its July 19, 1990 decision, the Court does not set forth which standard of review it is utilizing nor is it clear that any standard has been applied. However, affirming the lower court is improper because under either standard of review the Court of Appeals cannot look outside the Complaint and made factual findings on matters which were disputed below. The approach taken by the Court in the July 19, 1990 Opinion leads to inconsistent interpretation of 42 U.S.C. §1983 in this Circuit and is inconsistent with other cases of this Circuit

concerning reviews for Motions To Dismiss.

III

ARGUMENT

A. It Was Undisputed By All Parties Below That Fields Held A Tenured Position At The Appellee College At The Time He Was Terminated.

The Court's decision of July 19, 1990, unfairly brushes aside Fields' contention that the Complaint, Affidavits and other evidence before the Court below demonstrated that he held a tenured status at the Appellee college which was terminated without notice or hearing. The Court's July 19, 1990 decision focuses solely on Fields' administrative position and states that "his position as a member of the tenured faculty ... is unclear" and that the rules of the college, as embodied in the "Conditions Of Appointment For Administrative And

Non-Instructional Personnel (hereinafter "Conditions Of Appointment") did not "appear to permit" Fields "to hold a tenured faculty position." Slip opinion at 8. The Court stated that Fields' argument that he held a tenured status under such circumstances is the equivalent of claiming "multiple property interests within the same employment relationship" or that state law creates "numerous entitlements." Id. Finally, the Court concluded that it is unnecessary to consider Fields' claim that he held a tenured position at the Appellee college because an employer is not required to provide a predetermination proceeding for "various positions and employees might have held over the course of an employer-employee relationship". Id. at 9. Having brushed

aside the tenured status claimed to be held by Fields, the Court went on to determine that procedures were provided Fields prior to his termination which were adequate to satisfy due process with respect to his administrative position. Id.

In reaching this decision the Court overlooked the unequivocal and undisputed facts presented below which demonstrated that Fields was a tenured member of the college at the time of his termination. The facts concerning Fields tenured status are not "unclear" nor did the Conditions Of Appointment prohibit Fields from holding a tenured position. Not only did Fields allege in his Amended Complaint that he held tenure at the time he was terminated, and that his tenured position was not effected by the

Conditions Of Appointment (App. at 11-14, 34, 37-39), but he also backed up these allegations with the following uncontroverted evidence: the affidavit of Rafael L. Cortada, past President of the Appellee College and author of the "Conditions Of Appointment" (Appellant's Supplemental Appendix at 76-78); Affidavit of William Hammond, a former tenured professor and Associate Dean of Finance and Plant Management and acting President of Appellee college (Id. at 79-81); Affidavit of Raymond C. Bowen, former Vice President of the Appellee College (Id. at 82-84); Affidavit of Ralph Rodney Fields (Id. at 85-94); the Appellee Board Of Trustees Answers To Interrogatories (Id. 32-34); the Board Of Trustees Minutes wherein Fields was granted tenure as an Associate Professor

and Assistant Dean Of Faculty (Id. at 28-30); a letter from the President of the Appellee College and Secretary/Treasurer of the Board Of Trustees informing Fields that he had "been given tenure at the college" (Id. at 31); and the deposition testimony of the Appellee President and members of the Appellee Board Of Trustees (Id. at 35-75). As was argued by Fields below (Id. at 9-15, 124), these summary judgment documents demonstrated without dispute by the Appellees that Fields held tenure at the time of his termination and that no rule, including the "Conditions Of Appointment" affected Fields' tenured position in any manner. See, Appellant's Supplemental Reply Brief at 3-6; Appendix at 9-16.

Dr. Rafael Cortada served as President of the Community College Of

Baltimore and Secretary/Treasurer of the Board Of Trustees from "fall, 1977 until July, 1982". Appellant's Supplemental Appendix at 76. He authored and implemented the Conditions Of Appointment and unequivocally states the conditions of appointment always prospective and never retroactively affected any tenured employee at the Appellee college. Id. 76-78. In fact, it was Dr. Cortada's opinion that such retroactive application would have been unconstitutional that led him to implement the conditions only as a prospective measure. Id. at 77.

Raymond C. Bowen, who was the Vice President of the Appellee college under President Cortada states in his affidavit that he "worked closely with President Cortada on the development of the language and terminology of the

Conditions Of Appointment." Id. at 83. He recalls that there were various meetings held to discuss the particular issue of how the Conditions Of Appointment related to tenure. Id. Bowen states that "the conditions were only to be applied prospectively, i.e., it would only affect those holding administrative positions in the future and provided that no one would again tenure solely as an administrator after the conditions were implemented". Bowen states that it was his understanding that "the Conditions Of Appointment ... did not affect the tenure of any individual who had previously been granted tenure after having met the appropriate By-Law requirements in effect at the time tenure was awarded. Id. at 82.

H. W. Hammond, former Vice

President of Administrative Services under President Cortada, states in his Affidavit that "during meetings of college administrators, where the conditions of appointment were discussed, there was never any announcement or statement that the conditions would adversely impact any faculty staff, staff/member or administrator who had been granted tenure prior to the condition's effective date or retroactively take away anyone's tenure." Id. at 80. He states that he understood that the conditions of appointment would only be applied "prospectively" and would never affect any tenured employee who had been granted tenure status prior to the effective date of the conditions. Id.

Fields states in his Affidavit that because of the language of the

Conditions Of Appointment, questions were raised with President Cortada who told Fields and his colleagues that their tenured status at the Appellee college was in no way affected by the implementation of the Conditions Of Appointment but was rather prospective in nature. Id. at 88-89. President Cortada testified, uncontroverted by Appellees, to these facts at the State trial.

H. W. Hammond, Raymond C. Bowen, and Fields all state in their Affidavits that they were involved in other cases involving individuals tenured prior to the enactment of the Conditions Of Appointment. Id. at 80, 83 and 89. In each case it was determined that no individual granted tenure prior to the conditions of appointment lost that tenure by virtue of performing an

administrative function after the implementation of the Conditions Of Appointment. Id. In fact, these Affidavits in the record refer to another cause brought successfully by another former Dean (granted tenure on the same day as Fields) under 42 U.S.C. §1983 in the United States District Court for the District of Maryland.

The deposition excerpts attached to Plaintiff's Motion For Partial Summary Judgment below show that the Appellee college was unaware of any instance where the Board Of Trustees had ever taken away Dr. Fields' tenure. Appellant's Supplemental Appendix 9-10, 55, 64, 65, 70, 75. Moreover, the Appellee Board Of Trustees admitted in its Answers To Interrogatories Plaintiff held tenure on August 15, 1986, the date he was

terminated. Id. at 33-34.

Again, these Affidavits and other summary judgment papers went uncontested by Appellees in their Opposition to Dr. Fields' Motion For Partial Summary Judgment below. Therefore, this Court's finding that the status of Field's tenured position after becoming an administrator was "unclear" or did "not appear to be provided by the Conditions Of Appointment" are findings which are not supported by the facts below.²

B. In Affirming The District Court's Decision Below, The Court Of Appeals Did Not Apply An Appropriate Standard Of Review When It Looked Outside The Complaint And Made Determinations On Factual Issues.

2

Moreover, as discussed in Part III A above, such factual findings are improper on review of a district court's grant of Motion To Dismiss or Motion For Summary Judgment.

During the course of this Appeal, Appellant and Appellees disputed whether the Order appealed from was a grant of Summary Judgment under Federal Rule of Civil Procedure 56 or a dismissal under Federal Rule of Civil Procedure 12(b)(6). Appellant took the later position. See, Supplemental Brief For Appellant at 1 and Appellant's Supplemental Reply Brief at 1-2. The Appellees' Motion below was a "Motion To Dismiss And/Or In The Alternative, Motion For Summary Judgment."

Appellees' Supplemental Appendix at 5. Although the lower court's Order purports to grant summary judgment (Appendix at 162), its decision was based on the face of Fields' Complaint. See, Id. at 159-60. The Court below held as a matter of law that

"under these circumstances it is clear that Plaintiff has stated no claim under Section 1983". Id. at 160. The Court below made no determination as to material facts that were in dispute and did not rely upon any of the numerous affidavits, deposition excerpts and other summary judgment papers filed by either the Appellant or the Appellee. See, Id. at 159-61. The Appeal originally noted from the lower court's Order of January 29, 1988 was on a specific issue of whether the claimant had stated a cause of action under Section 1983 so as to avoid at 12(b)(6) dismissal for failure to state a claim.

In this Court's original Opinion, 856 F.2d 655, 657 (4th Cir. 1988), it was noted that the "district court granted defendant's motion for

summary judgment on the § 1983 claim" but it was also concluded that in light of Parratt and Hudson "Fields had failed to state a claim cognizable under § 1983". In the subsequent decision of July 19, 1990, although this Court concluded "that Fields has not alleged a due process violation because he has received sufficient process." (Slip Opinion at 1), the Court does not set forth a standard of review, nor does it identify whether it deems the lower court's Order to be based on Motion For Summary Judgment or a Motion To Dismiss. Different standards of review apply to each type of order on appeal. However, under either standard of review, it would be improper for this Court to look outside of the Complaint and summarily determine issues of fact not decided below. Here the Court

determined that the procedures were provided to Fields prior to his termination satisfied due process. See, Slip Opinion at 2-3, 9-11.

1. Standard Of Review Of An Order Granting A Motion To Dismiss:

In reviewing a dismissal for failure to state a claim upon which relief can be granted, the Court Of Appeals must accept all material allegations of the Complaint as true and resolve all factual disputes in favor of Appellant. Kelson v. City of Springfield, 767 F.2d 651, 653 (9th Cir. 1985); O'Quinn v. Manuel, 773 F.2d 605, 608 (5th Cir. 1985). The Court Of Appeals is required to evaluate the correctness of the dismissal solely on the basis of the allegations in the Complaint; it cannot look outside the pleadings nor can it uphold dismissal

unless it appears beyond doubt that Plaintiff can prove no set of facts in support of its claim which would entitle it to relief. Id.; Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02 (1957); Ware v. Associated Milk Producers, Inc., 614 F.2d 413, 415 (5th Cir. 1980); O'Quinn v. Manuel, 767 F.2d 174, 177 (5th Cir. 1985). Although the Court Of Appeals may affirm a district court's dismissal on any basis fairly supported by the record, dismissal under Federal Rule Of Civil Procedure 12(b)(6) should not be affirmed unless it is clear that the complaint could not be saved by any amendment. Kelson v. City of Springfield, 767 F.2d 651, 656 (9th Cir.1985).

The case of Ware v. Associated Milk Producers, Inc., 614 F.2d 413 (5th

Cir. 1980) presented facts similar to the present case. There the defendant had filed a "Motion To Dismiss Or For Summary Judgment" and there was a dispute over whether the lower court's order granting the motion was a grant of dismissal or summary judgment. Id. at 414. Although the lower court had "indicated" it was granting summary judgment, the Court of Appeals found that the order itself was based on the Complaint alone and was therefore was a grant of defendant's Motion To Dismiss. Id. Based on this determination, the court held that the proper standard of review was to "evaluate the dismissal solely on the basis of the allegations in the complaint." Id.

Fields takes the position that the Order appealed from in this case is

analogous to the Order appeared from in Ware v. Associated Milk Producers, Inc., supra. See, Supplemental Brief For Appellant at 1 and Appellant's Supplemental Reply Brief at 1-2. As such, this Court was required to evaluate the District Court's Order solely on the basis of the Complaint. However, this standard of review for a Motion To Dismiss was not followed. By finding that Fields received adequate notice and opportunity to be heard prior to his termination, and by concluding that Fields tenured status was "unclear" and apparently not permitted by the Conditions Of Appointment, this Court did not accept the allegations and inferences therefrom in the Complaint as true.

As set forth above, Fields alleged facts which, if accepted as true,

demonstrate that he did not receive adequate notice or reasons for his termination, and did not receive a hearing, with respect to his administrative position. See, Appendix at 25-26, 28-31, 33-34, 38-39; see, also, Appellant's Supplemental Reply Brief at 6-11. Moreover, Fields alleged facts which, if accepted as true, demonstrate that he held a tenured position at the Appellee college which was terminated without any notice or hearing whatsoever. See, e.g. Appendix at 11-14, 34, 37-39, 50; see, also, Appellant's Supplemental Reply Brief at 3-6. In light of these facts, it could not be concluded to a certainty that Fields is entitled to no relief under any statement of facts which could be proved in support of his claim. See, 2A Moore's Federal Practice, §12.8

at 2271-74 (2d. Ed. 1983).

2. Standard Of Review Of An Order
Granting Summary Judgment:

On the other hand, in reviewing a case decided on Motion For Summary Judgment, the Court Of Appeals reviews the case de novo, and does so by examining and reviewing the evidence in a light most favorable to the non-moving party. Mead Reinsurance v. Granite State Insurance Company, 873 F.2d 1185, 1187 (9th Cir. 1988); Morgan v. Mobile Oil Corp, 726 F.2d 1474, 1477 (10th Cir. 1984). Under this standard the Court of Appeals applies the same test as is applied below, that is, whether there is any genuine issue of material fact and whether the district court correctly applied the relevant law. Ed. Houser v. Enterprises, Inc. G. General Motors

Corp., 595 F.2d 366, 368 (7th Cir. 1978);
see also, Mead Reinsurance v. Granite
State Insurance Company, 873 F.2d 1185,
1187 (9th Cir. 1988); Byers v. Burleson,
713 F.2d 856, 859 (D.C. Cir. 1983);
Pierson v. Grant, 527 F.2d 161, 163-64
(8th Cir. 1975). Summary judgment could
not be sustained on appeal where the
record is "unclear" on fact or legal
theory forming the basis of the ruling.
Atkinson v. Jory, 292 F.2d 169, 171 (10th
Cir. 1961).

Although the reviewing court
has the power to affirm an order granting
summary judgment on grounds different
from those relied upon in the district
court, Ross v. Communication Satellite
Corp., 759 F.2d 355, 363 (4th Cir. 1985),
the new grounds must find support in the
record and the Court should proceed with

caution so as to avoid the denying the opposing party a fair opportunity to dispute the facts material to the new grounds relied upon. Securities and Exchange Commission v. Southwest Coal & Energy Co, 624 F.2d 1312, 1317 (5th Cir. 1980); U.S. v. General Motors Corp., 518 F.2d 420, 441 (D.C. Cir. 1975). Generally, summary judgment can be affirmed on appeal only if the evidence available to the trial judge at the time he ruled on the motion established that there was no genuine issue of material fact. Street v. Surdyka, 492 F.2d 368, 374 (4th Cir. 1974) (except in extraordinary cases 'such as the instant case' where the disputed facts have been fully developed in a subsequent trial). On appeal from summary judgment, it is not within the province of the Court of

Appeals to make determinations on factual issues. Devex Corp. v. Houdaille Industries, Inc., 382 F.2d 17, 21 (7th Cir. 1967); Bowman Steel Corp. v. Lumbermen's Mutual Casualty Company, 364 F.2d 246, 250 (3rd Cir.1966); Page v. Work, 290 F.2d 323, Cert. denied 82 S.Ct. 121, 368 US 875. If a genuine dispute exists as to any material fact, summary judgment cannot be affirmed. Breen v. Centex Corp., 695 F.2d 907, 910, 914 (5th Cir. 1983).

In the present case, therefore, if the Court's July 19, 1990 decision was based on the assumption that the lower court's order granted summary judgment, then it has improperly made determinations of factual issues but concluding that Fields received notice and opportunity to be heard and that his

tenured status was "unclear" and apparently not permitted by the Conditions Of Appointment. In his Supplemental Reply Brief at pages 3-11, Fields has demonstrated that it would have been improper to grant summary judgment on the issues of tenure, notice and/or hearing. Whether Fields received notice as to the termination of his administrative position and/or tenured position with the Appellee college, and whether he received a fair and impartial hearing with respective to his administrative and/or tenured position were, at the very least, disputed issues of fact below. Appellant's Supplemental Reply Brief at 3-11. In fact, Fields demonstrates in his Reply Brief that had the lower court reviewed the summary judgment papers, it could have entered

summary judgment in his favor with respect to the termination of his long-standing tenured position at the Appellee college.

In sum, in reaching its decision, this Court has either looked outside of the Complaint which is improper in reviewing a Motion To Dismiss or, this Court has made a determination of fact which is improper in reviewing a Motion For Summary Judgment.

IV.

IN BANC REVIEW

Although a rehearing in banc is not generally favored it should be ordered in this case because the Petition presents questions of exceptional importance that are necessary to secure and maintain uniformity and effectuation of 42 U.S.C. §1983 claims and to maintain

uniformity on this Court's decisions regarding standards of review to be applied in reviewing an order which grants a Motion To Dismiss or Motion For Summary Judgment. Further, the present decision is contrary to this Court's prior holding in the extraordinary situation, where facts are fully developed at an intervening trial.

This case was remanded to the Fourth Circuit in light of Zinnerman v. Burch, 100 St. Ct. 975 (1990) an important case which sought to resolve a dispute among the federal circuits and clarify the law involving the application of the Parrat/Hudson line of 1983 cases. Appellant argued that under Zinnerman, this case was not controlled by the Parratt or Hudson cases and should not have been dismissed on that ground. On

remand, however, this Court has avoided this important issue and decided the case on a completely different ground. However, in doing so, it has failed to set forth the standard of review it is following and has made findings of facts which were disputed below and which contradict the allegations in Plaintiff's Complaint and therefore, are improper under the applicable standards of review for a Motion To Dismiss or a Motion For Summary Judgment.

In addition, the Court has based its opinion on facts which are not accurate and which are contrary to the unequivocal facts set forth in the affidavits submitted by Appellant below.

IV.

CONCLUSION

In conclusion, this Court's

July 19, 1990 decision in effect hold that a tenured professor has no right to bring a due process claim if he is dismissed without notice or hearing; this ruling should not be allowed to stand. More importantly, by failing to apply the appropriate standard of review, this Court has arbitrarily affirmed the lower court's decision by making findings of fact which contradict the evidence below and which ignore the allegations of the Complaint. Therefore, Fields requests that this case be set in for a rehearing in banc due to the unusual nature of this case and the Mandate of the United States Supreme Court.

Respectfully submitted,

Barry L. Steelman
Nicholas D. Cowie

Barry L. Steelman, P.A.
Suite 720 Two Hopkins Plaza
Baltimore, Maryland 21201

(301) 539-8603
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August, 1990, a copy of the foregoing Appellant's Petition For Rehearing And Suggestion For Rehearing In Banc was mailed by first class mail, postage prepaid, to John S. Woods, Esquire and Burton Levin, Esquire, Office of the City Solicitor, City Hall, 100 North Holliday Street, Baltimore, Maryland 21202, attorneys for Appellees.

BARRY L. STEELMAN

APPENDIX H

APPENDIX H

1931 539-2807

Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this
1st day of August, 1931, a copy of the
aforesaid Appellant's Petition for
Reformation and Correction of
Records was mailed by first class mail,
postage prepaid, to John E. Woods,
County Clerk and Ex-Officio, Office
of the City Auditor, City Hall, 1st
Floor, 601 Broadway Street, Baltimore,
Maryland 21202, Attorneys for Appellant.

WALTER C. STONE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 14, 1990

No. 88-1564

RALPH RODNEY FIELDS

Plaintiff - Appellant

v.

JOSEPH T. DURHAM, Individually and as
President of Community College of
Baltimore; COMMUNITY COLLEGE OF BALTIMORE
CITY; JAMES S. JEFFERS, Chairman of the
Board of Trustees Community College of
Baltimore; THE BOARD OF TRUSTEES
COMMUNITY COLLEGE OF BALTIMORE

Defendants - Appellees

**ON PETITION FOR REHEARING WITH SUGGESTION
FOR REHEARING IN BANC**

The appellant's petition for
rehearing and suggestion for rehearing in
banc were submitted to this Court. As no
member of this Court or the panel
requested a poll on the suggestion for
rehearing in banc, and

- lh -

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
FILED
August 14, 1960
NOT RECORDED
RALPH ROONEY, JR.
V. JAMES H. HARRIS, JR.
- Appellant -

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkinson with the concurrence of Judge Chapman and Judge Wilkins.

/S/
Clerk

